

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 19, 2007 Session

STATE OF TENNESSEE v. TOMMY DeWAYNE SMITH

**Direct Appeal from the Criminal Court for Sumner County
Nos. 289-2006 & 311-2006 Dee David Gay, Judge**

No. M2007-00932-CCA-R10-CO - Filed February 21, 2008

Defendant, Tommy DeWayne Smith, was charged with the crimes of statutory rape, criminal exposure to HIV, and sexual exploitation of a minor. The State denied Defendant's request for pretrial diversion. The trial court, after conducting a hearing and reviewing the record available to the district attorney general, denied Defendant's writ of certiorari. Defendant was granted an interlocutory appeal pursuant to Rule 10 of Tennessee Rules of Appellate Procedure. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, J.J., joined.

Michael W. Edwards and Russell E. Edwards, Hendersonville, Tennessee, for the Appellant, Tommy DeWayne Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; L. Ray Whitley, District Attorney General; Sallie Wade Brown, Assistant District Attorney General; and Bryna Landers Grant, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Background

At the time of the hearing in the trial court, Defendant was a forty-two year old HIV-positive man. The victim, D.G. (he will be referred to by his initials), was involved in the charges of statutory rape and sexual exploitation of a minor. The remaining charges concerned photographs of another minor on Defendant's computer. Defendant met D.G. on a website called gay.com. The website requires that users be at least eighteen years of age and D.G.'s profile listed his age at eighteen, even though he was actually seventeen. Defendant's profile listed his age as one hundred, although in "chatting" with the victim he told him he was thirty-six. Defendant was actually forty-

one years old at the time the incident occurred. Defendant invited the victim to his home in Gallatin, Tennessee in early January 2006. The versions of the events that occurred at the home differ between the victim and Defendant, although both agree that the victim performed anal sex on Defendant and did not use a condom.

In Defendant's application for pretrial diversion, he stated that he received an instant message from D.G. on his computer. Defendant and the victim then "chatted" online about mutual acquaintances. During the conversation, the victim mentioned that he would be near Defendant's home visiting a friend that day and that he (the victim) wanted to meet Defendant. Defendant stated that this point he told the victim he was HIV positive. The victim then asked Defendant if he could come by Defendant's home on his way to meet the friend and the Defendant said "sure." When the victim arrived, Defendant told him "he looked young for being age eighteen" and the victim responded that he "got that all the time." They talked about a mutual friend and the victim asked if Defendant and that friend had ever been together sexually and Defendant answered "no because [the friend] was afraid of my [Defendant] being HIV positive." After talking for about thirty minutes, the victim asked Defendant to perform oral sex on him. Defendant told him that he did not believe this would be safe because he had stitches in his mouth.

The victim and Defendant then went into Defendant's bedroom so that they could engage in anal sex. Defendant stated that he told the victim there was a condom in the chair beside the bed and that he needed to use the restroom. When the Defendant came back out he assumed the victim had made use of the condom and they engaged in anal intercourse. After the sexual encounter, the victim and Defendant talked and watched television a little while longer and then the victim left to meet his friend. When the Defendant went to bed that night, he realized that the victim had not used a condom.

In the State's denial of pretrial diversion the facts differ in several key areas from the facts given by Defendant in his application. The victim agreed that he and Defendant decided to meet at Defendant's home and that they engaged in anal sex and that the sex was consensual and unprotected. The victim stated, however, that they had both oral and anal sex. The victim also said that Defendant never informed him of his HIV status. The victim learned of Defendant's HIV status from a mutual friend. After learning this information, the victim contacted the Sheriff's Department and made a recorded phone call to Defendant. In this phone call, Defendant acknowledged that the victim was seventeen, that they had sex, and that he was HIV positive.

The victim testified at Defendant's preliminary hearing in General Sessions Court. He testified that he thought he remembered telling Defendant that he was seventeen when he arrived at Defendant's house. He also testified that he could not recall if Defendant performed oral sex on him. However, in his discussions with police, he stated that oral sex did occur. The victim further stated that Defendant did not tell him he was HIV-positive and did not insist that he use a condom. The victim stated that he went to Defendant's home voluntarily and that he engaged in sexual relations voluntarily.

Defendant testified at the trial court hearing regarding the denial of his request for pretrial diversion. He stated that the victim never told him he was under eighteen. Defendant stated that he told the victim he looked “young for being age eighteen” and the victim replied that he “got that all the time.” Defendant also testified that he informed the victim of his HIV status and told the victim where the condoms were located in his bedroom. Defendant testified that he did not know that the victim did not use a condom until he got ready for bed a few hours later and noticed that the condom was unopened. Defendant stated that they did not engage in oral sex because Defendant had been at the dentist earlier that day and had stitches in his mouth and did not feel it was safe due to his HIV status.

Defendant testified that the sexual exploitation of a minor charges resulted from an e-mail he received. He stated that he opened the e-mail from an account he did not know and saw the picture of the child and immediately erased it.

II. Analysis

The pretrial diversion statute allows a district attorney general to suspend the prosecution of an eligible defendant for a period not to exceed two years. *See* T.C.A. § 40-15-105(a)(1). To be eligible for pretrial diversion, the defendant: (1) must not have been previously granted pretrial diversion; (2) must not have a prior misdemeanor conviction for which a sentence of confinement was served or a prior felony conviction within a five-year period after completing the sentence or probationary program for such conviction; and (3) must not be charged with a Class A felony, a Class B felony, certain Class C felonies, certain sexual offenses (not including statutory rape or sexual exploitation of a minor), driving under the influence, or vehicular assault. *Id.* at (a)(1)(B)(i).

There is no presumption that a person eligible for pretrial diversion is entitled to diversion. *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999). The defendant bears the burden of establishing pretrial diversion is appropriate and in the interest of justice; therefore, it is the defendant’s responsibility to submit substantial favorable evidence for the district attorney general’s consideration. *State v. Bell*, 69 S.W.3d 171, 179 (Tenn. 2002).

The decision to grant or deny an application for pretrial diversion is within the discretion of the district attorney general. T.C.A. § 40-15-105(b)(3); *State v. Pinkham*, 955 S.W.2d 956, 959 (Tenn. 1997). The district attorney general must focus on the defendant’s amenability to correction and consider any factors which tend to accurately reflect the defendant’s propensity to become a repeat offender. *State v. Yancey*, 69 S.W.3d 553, 557 (Tenn. 2002); *State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983). These factors include: (1) the circumstances of the offense; (2) the defendant’s criminal record; (3) the defendant’s social history; (4) where appropriate, the defendant’s physical and mental condition; (5) the likelihood pretrial diversion will serve the ends of justice; and (6) the best interest of both the public and the defendant. *Hammersley*, 650 S.W.2d at 355. The district attorney should clearly articulate these factors for the record to facilitate appellate review. *Id.* If pretrial diversion is denied, the denial must be written, must list the evidence considered,

discuss which factors were considered, and discuss the weight accorded to each factor. *Curry*, 988 S.W.2d at 157.

If an application for pretrial diversion is denied, a defendant may appeal to the trial court for a writ of certiorari to determine if the district attorney general abused his or her prosecutorial discretion. T.C.A. § 40-15-105(b)(3). In reviewing the prosecutor's decision, the trial court must consider only the evidence considered by the district attorney general and conduct a hearing only to resolve factual disputes concerning the application. *Curry*, 988 S.W.2d at 157-58. The discretion to grant or deny pretrial diversion rests with the district attorney general rather than the trial court. *Bell*, 69 S.W.3d at 179. The trial court is to review the method used by the prosecutor, but not "the intrinsic correctness" of the prosecutor's decision. *Yancey*, 69 S.W.3d at 558-59. The trial court may not reweigh the evidence or substitute its view for that of the prosecutor. *Id.* at 559.

The trial court must determine whether the prosecutor has abused his or her discretion by failing to consider and weigh all the relevant factors or by reaching a decision not supported by substantial evidence. *Curry*, 988 S.W.2d at 158. If the trial court concludes the prosecutor failed to consider all the relevant factors and their weight when the prosecutor denied an application for pretrial diversion, the trial court must reverse the prosecutor's decision and remand the matter to the prosecutor for further consideration of all the relevant factors. *Bell*, 69 S.W.3d at 179. If the trial court determines the district attorney's office considered all relevant factors and their weight, it must further determine whether there is substantial evidence to support the decision to deny diversion. *Yancey*, 69 S.W.3d at 559. This court, like the trial court, is limited to considering only the evidence considered by the district attorney general. *Id.*

In the instant case, the trial court correctly considered only the evidence reviewed by the prosecutor. In reaching its decision that the prosecutor did not abuse her discretion, the trial court, on the record, went through several of the prosecutor's observations. The trial court stated that the prosecutor properly laid the foundation on which she based her decision and that it was the trial court's job to "look and see what factors she considered and the reasons she gave." The trial court found that the prosecutor properly considered Defendant's lack of a concise work history as a concern for granting pretrial diversion. Likewise, the trial court found that the fact that Defendant had lived in five different places in ten years as a proper consideration. The trial court stated that consideration of Defendant's lifestyle, in that he met the victim online and had sexual relations with him the first time they met in person, was appropriate. The trial court also found that it was proper that the prosecutor considered the fact that he admitted to using marijuana illegally, even if it was to stimulate his appetite as a result of his HIV medications. The trial court stated that although Defendant has no prior record, "respect for the law is a valid consideration." The trial court determined that the facts that Defendant has no income and lives with his grandmother were valid considerations by the prosecutor. The trial court referred in detail to its perception of Defendant's mental health, although the prosecutor conceded that other than his HIV status and her understanding of what that diagnosis does to a person, there is nothing in the application relating to his mental health. The last point the court addressed was that in this case the prosecutor was correct in concluding that pretrial diversion would not serve the ends of justice. The court concluded its

opinion stating, “I find that she stated on the record all the considerations that should be considered under law. I find that she weighed all those and in that denial letter, she set out some positive things along with negative things.”

We agree with the conclusion of the trial court. The prosecutor fully set forth her reasons for denying diversion. The trial court found that she gave the proper weight to the factors and we see nothing in the record that indicates otherwise. The prosecutor acknowledged that Defendant does not have a criminal record, but found no other circumstances that made him amenable to correction. Defendant argues that the instant case is analogous to *State v. McKim*, 215 S.W.3d 781 (Tenn. 2006). In *McKim*, the prosecutor did not consider certain factors favoring diversion, but did consider factors irrelevant to diversion. Because of the consideration of irrelevant factors (that defendants charged with criminally negligent homicide should not be statutorily eligible for pretrial diversion), and the lack of consideration of those factors that favored diversion, our Supreme Court held that the prosecutor had abused his discretion. In the instant case, the prosecutor looked for factors that favored diversion and stated in her denial “[n]ormally in reviewing applications for diversion there are some positive aspects to be considered. Other than the fact that he graduated from high school and has no prior criminal history, I find little to recommend this applicant for diversion.” Unlike the prosecutor in *McKim*, the prosecutor in the instant case looked for factors favoring diversion and weighed them accordingly. She then concluded that Defendant had not “put his best foot forward” and denied the application. We conclude that she adequately delineated her reasons for the denial and did not abuse her discretion as a prosecutor. Thus, Defendant is not entitled to relief.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE